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JUN 4 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

June 5, 1999

Via Hand Delivery

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Presentation in CC Docket No. 96-98

Dear Ms. Salas:

Pursuant to 47 C.F.R. § 1.1206, the Building Owners and Managers Association International ("BOMA"), the Institute of Real Estate Management ("IREM"), the International Council of Shopping Centers ("ICSC"), the National Apartment Association ("NAA"), the National Association of Real Estate Investment Trusts ("NAREIT"), the National Multi Housing Council ("NMHC"), and the National Realty Committee ("NRC") (jointly, the "Real Estate Associations"), through undersigned counsel, submit this original and one copy of a letter disclosing an oral and written ex parte presentation in the above-captioned proceeding.

On June 3, 1999, the following representatives of the Real Estate Associations met with Ari Fitzgerald of Chairman Kennard's office:

Jim Arbury
Megan Booth
Anna Chason
Gerard Lavery Lederer
Matthew C. Ames
Nicholas P. Miller

NMHC and NAA;
IREM;
NAREIT
BOMA;
Miller & Van Eaton, P.L.L.C.; and
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The meeting addressed forced access to buildings by wireless providers. The attached written ex parte presentation, which was given to Mr. Fitzgerald, summarizes the matters that were discussed in the meeting.

Please contact the undersigned with any questions.

Very truly yours,

Miller & Van Eaton, P.L.L.C.

By 
Matthew C. Ames

cc: Ari Fitzgerald, Esq.

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THE REAL ESTATE INDUSTRY URGES THE FCC TO REJECT FORCED ACCESS BY FIXED WIRELESS PROVIDERS

The real estate market is highly competitive and responsive to customer demands, including demands for all types of telecommunications services. As the FCC has recognized, the competitive real estate market gives building owners an incentive to satisfy their tenants' needs. *Telecommunications Services – Inside Wiring*, CS Docket No. 95-184 and MM Docket No 92-260, Report and Order and Second Further Notice of Proposed Rulemaking, 10 Comm. Reg. (P&F) 193 (1997), at ¶ 61. Consequently, the Real Estate Coalition,¹ which represents the owners and managers of multi-tenant residential and commercial properties, believes that the market will find ways to give fixed wireless providers access to buildings.

The Coalition opposes Commission action in this area for the following reasons:

- **Commission action would unnecessarily interfere with the existing free market.** The real estate industry is highly fragmented, dynamic and competitive. This means that no individual real estate owner has any significant degree of market power. The resulting competition forces building operators to respond to the needs of tenants and residents by accommodating requests for service.
- **Wireless providers are successfully negotiating access agreements, as the following examples show:**
 - ❖ In the first quarter of 1999, WinStar's penetration in networked buildings increased to average of 14%, above the company's long-term goal of 10%. *Communications Daily*, May 13, 1998, p. 10.
 - ❖ On May 11, 1999, WinStar announced a deal to serve 11 buildings owned by Great Lakes REIT, with an option for 20 more. The press release stated that WinStar's service will allow Great Lakes "to differentiate [their] properties] from their competition."
 - ❖ WinStar has entered into an agreement to provide broadband, voice, data, and Internet services in 90 buildings owned by Equity Office Properties Trust. These buildings are located in Atlanta, Boston, Chicago, Dallas, Denver, Los Angeles, Philadelphia, and Seattle. *Communications Daily*, April 7, 1999, p. 8.
 - ❖ On January 5, 1999, WinStar announced that it has obtained access rights to more than 4200 commercial buildings nationwide, exceeding its 1998 goal.
 - ❖ WinStar and Spieker Properties have negotiated an agreement that gives WinStar access to over 600 office buildings in Los Angeles, the Bay Area, and Seattle. *Telecommunications Reports*, Dec. 21, 1998, p. 28.

¹ The Building Owners and Managers Association International, the Institute of Real Estate Management, the International Council of Shopping Centers, the National Apartment Association, the National Association of Real Estate Investment Trusts, the National Multi Housing Council, and the National Realty Committee.

- **There are sound policy reasons for preserving the control of building owners over their property.** For example, a property owner must have the right to enter into a contract with any person who has access to the building. This is the only way to manage the asset rationally and to protect the persons and property of all involved. If tenants and service providers can install facilities at will, the property owner cannot protect itself, tenants or third parties from potential injury -- and might face liability itself.
- **The Commission has no inherent authority to take private property, and Congress did not authorize it to do so.** Installation of wiring and other facilities is clearly and unavoidably a physical invasion of property, and therefore any regulation authorizing such installations without the owner's consent is a taking under the Fifth Amendment. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994). Congress has not directed the FCC to take the property of building owners, nor has it appropriated funds for that purpose.
- **The FCC has no authority over building owners as such.** *Illinois Citizens Committee for Broadcasting, et al. v. Sears, Roebuck & Co.*, 35 FCC 2d 237, *aff'd*, 467 F.2d 1397 (7th Cir. 1972) (FCC had no jurisdiction to address concerns raised by construction of Sears Tower).

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